



U.S. Citizenship
and Immigration
Services

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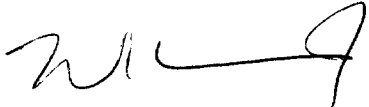
IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Illinois that manufactures specialty machinery. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Ahmadabad, India. The petitioner now seeks to employ the beneficiary as its chief engineer.

The director concluded that the beneficiary has been employed abroad and would be employed in the United States as a machine technician or mechanical engineer, rather than a manager or executive. The director further found that the petitioner failed to establish that it would support two managerial positions within one year. The director therefore denied the petition.

On appeal, counsel explains that although the beneficiary would be assigned the title of chief engineer in the U.S. company, he would be the manager of the customer service department. Counsel submits a comprehensive description of the beneficiary's proposed job duties and additional documentation in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The AAO will first consider the issue of whether the beneficiary has been employed abroad in a qualifying capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The director acknowledged in his November 24, 2003 decision the following job duties performed by the beneficiary while employed by the foreign company:

- 25% - Erection and commissioning of new machines supplied to customers
- 20% - Training of customers for safe operation and maintenance of machines
- 25% - Solving customer problems through physical visits
- 15% - Training junior engineers while in Mamata
- 15% - Understanding and absorbing operations and technology of new machines being developed at Mamata

The director concluded that the beneficiary was not employed abroad as a manager or executive, but instead was performing functions similar to a machine technician or mechanical engineer. The director therefore denied the petition.

Counsel failed to address this issue on appeal. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As counsel failed to submit evidence on appeal contesting the director's finding, the AAO cannot conclude that the beneficiary was employed abroad in a primarily managerial or executive capacity. For this reason, the appeal will be denied.

The AAO will next address the issue of whether the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

The petitioner stated on the nonimmigrant petition, filed September 19, 2003, that the beneficiary would be employed in the United States as the petitioner's chief engineer. In an attached business plan for the petitioning organization, the petitioner explained that the beneficiary would lead both the engineering and customer support units, and would assist in training personnel. The petitioner also identified the proposed U.S. employees as an electrical engineer, an electrical wireman, a mechanical fitter, an office assistant, and a commercial officer.

On September 22, 2003, the director issued a request for evidence asking that the petitioner provide a detailed list of the beneficiary's proposed job duties, including an allocation of time spent on each job duty. The director also requested detailed current and projected organizational charts of the petitioning organization clearly identifying the beneficiary's proposed position, departments, employees, and their job duties.

In a letter dated October 1, 2003, counsel stated that as senior service engineer, the beneficiary would perform the following job duties:

1. Testing of the machine[s] at [the petitioning organization] prior to dispatch to customers.
2. Conducting specific trials for the customers at [the petitioning organization] on the machines.
3. Erection and commissioning of machines supplied to the customers.
4. Training of new technicians recruited at [the petitioning organization] for [the petitioner's] products.
5. Providing after sales support in terms of advice and trouble shooting to [the petitioner's] customers [in the] USA, Canada and South America.

Counsel also provided an allocation of the beneficiary's time, noting that 50% of his time would be divided evenly between erecting machines and providing technical support, while the remaining 50% would be spent as follows: testing machines, 10%; conducting customer trials, 20%; and training new recruits, 20%. The current U.S. organizational chart submitted by counsel identified the beneficiary as reporting to the senior vice president, with no subordinate employees. In contrast, the projected organizational chart indicated that the beneficiary would oversee the new recruitment of an electrical engineer. An attached document noted that the electrical engineer would be responsible for installing machines at the customer's location and providing after sales support.

In a decision dated November 24, 2003, the director outlined the above-listed job duties of the beneficiary, and concluded that, similar to the beneficiary's position abroad, the beneficiary's responsibilities within the U.S. entity would resemble those of a machine technician or a mechanical engineer, rather than a manager or executive. The director stated that the U.S. operation would not be able to support the beneficiary in a primarily managerial or executive position within one year of approval of the petition, and consequently, denied the petition.

Counsel filed an appeal on December 29, 2003, stating that, although the beneficiary's proposed position is as chief engineer, the beneficiary would manage the customer services department and would report directly to the chief operating officer. Counsel states that the beneficiary's "primary objectives" would be establishing customer support standards, and describes the beneficiary's position as follows:

- This position will report to the Chief Operating Officer and will be responsible for overall product technical services and engineering.

- Directs and coordinates activities of [the] department in manufacturing establishment concerned with providing customers technical services in conjunction with marketing activities.
- Coordinates technical liaison services between management production department, sales department, and customers with newly developed techniques or practices in processing company products and to inform customers of new types, specifications, and end-uses of products.
- Confers with production department managers to assist in specific classification of products from quality assurance position, report on new product or process technology of competitors, and to discuss new specification required by customers.
- Directs investigation of customer complaints regarding quality, tolerances, specifications, and delivered condition of products. Records, analyzes, and informs concerned personnel of production quality assurance, and sales departments of status disposition of customer complaints and claims.
- Negotiates settlement of claims, for which [the] company is responsible, within limits prescribed by management. May survey potential markets for increasing sales.
- He will establish long-term vision, goals, policies and procedures for the department and will work with senior management in order to define overall strategy and develop roadmaps for implementation.
- He will recruit, develop, train and motivate world class customer service teams.
- He will collaborate with sales and marketing to provide engineering inputs for functional specifications and application requirements that are responsive to [the petitioner's] customer needs.
- He will be responsible for service functions to achieve efficient, economical and timely service and to achieve the highest standard of customer satisfaction, which is integral to [the petitioner's] future growth.
- He will be responsible for effective product and process training for new service engineers, industry representatives and customer service personnel in order for them to comply with customer request and needs for providing applications engineering services, customization replacement of parts and selection assistance.
- He will engage in customer visitations and will provide explanations of products. He will engage in proactive discussions related to customer's plans and future expansions and will help promote and maintain customer relationships and satisfaction. His in depth knowledge of their products and his ability to establish relationships with their customers will enhance [the petitioner's] ability to provide responsive customer focused support teams.

- Receive incoming shipments including verification of quantity, weight packaging and packing list.
- Perform inspection of incoming and out going components, assemblies, sub assemblies and machines for appearance and functional correctness using objective acceptance criteria.
- Supervise follow up with customers to ensure customer satisfaction. He will be directly accountable for the selection, promotion and performance of subordinate managers.
- Understanding the customer base and ensuring for the needs of the customers. Supervising the maintenance of the machinery used for repair of [the petitioner's] [m]achines.

On review, the record does not demonstrate that within one year of approval of the petition the petitioning organization would support the beneficiary in a primarily managerial or executive capacity. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans, expected personnel, and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. See 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who would primarily perform qualifying duties.

In the present matter, the petitioner has not demonstrated that within one year of approval of the petition, the beneficiary would be relieved from performing primarily non-qualifying job duties. The petitioner explained in its response to the director's request for evidence that it anticipated hiring an electrical engineer as the beneficiary's subordinate employee. The petitioner stated that the electrical engineer would be responsible for providing sales support and installing machines. It is unlikely that the beneficiary's one subordinate employee would handle the petitioner's entire sales support and machine installation, thereby relieving the beneficiary from these non-qualifying duties. Yet, even if this were the case, the petitioner has not accounted for the employment of any individuals who would perform the beneficiary's additional non-managerial and non-executive job duties of negotiating claim settlements, verifying shipments, and inspecting machinery. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Additionally, it does not appear that the petitioner's reasonable needs would be met by the anticipated personnel structure. Section 101(a)(44)(C) of the Act states that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Although the petitioner in the instant matter is a new company with two employees, the

petitioner indicated that its anticipated organizational structure would include eight employees, one of which would be subordinate to the beneficiary. Based on the petitioner's representations, it does not seem credible that the reasonable needs of the petitioner's customer service department would be met by the services of the beneficiary as the chief engineer and an electrical engineer. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based on the foregoing reasons, the AAO cannot conclude that within one year of approval of the petition the beneficiary would be employed by the U.S. entity in a primarily managerial or executive position. For this additional reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.